

Memorandum

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Date: December 8, 1998

To: The Honorable Bruce Babbitt
Secretary of the Interior

From: Lester A. Snow
Executive Director

Subject: Clean Water Act, Section 404 Compliance Process

The CALFED Bay-Delta Program was established to develop a comprehensive solution to problems facing the Bay-Delta system, in the areas of ecosystem quality, water quality, water supply reliability, and levee and channel integrity. The Program has crafted programmatic alternatives that will address these multiple concerns over an implementation period of 30 years or more. The preferred programmatic solution will likely include hundreds of individual actions combined with a carefully crafted monitoring program to guide implementation based on adaptive management. Many of these actions will involve potential impacts to wetlands and waters of the United States and will therefore require Department of the Army Permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act (Section 404 Permits for short). The actions potentially range from major, highly controversial projects such as construction of new surface storage facilities to creation of new or enhanced wetlands habitat by contouring land and changing local hydrology. It is critical to the success of the Program that an effective strategy for addressing the Section 404 Permits process for this diverse range of potential actions be developed and agreed to prior to the Record of Decision for the Program.

Many stakeholders are urging that the U.S. Environmental Protection Agency and the Army Corps of Engineers issue a "programmatic" 404 permit that would assure that the CALFED solution actions would be permissible under a clearly defined process with appropriate decision criteria. Although an actual 404 permit would not be available at the time of the Record of Decision, the Corps of Engineers, USEPA, the State of California, and CALFED staff are developing a plan to facilitate Section 404 Permitting during Program Implementation. It includes:

- An early permitting process for those projects included in the first "bundles" of CALFED actions in Stage 1 of Program Implementation.
- Developing broad "programmatic 404 assurances" regarding the need for surface storage or conveyance facilities in the CALFED Program. Identifying this needs analysis will allow for a more expedited and limited 404 permit evaluation when particular projects need site-specific permits.

These efforts to set the stage for Section 404 permitting during Program implementation can also serve an important assurances function by linking various Program actions. Each Stage 1 bundle could potentially be submitted for comprehensive 404 permits covering all actions in that bundle, so that no one action could move toward implementation before the bundle as a whole is permitted. In addition, the needs analysis and performance criteria for nonstructural methods to achieve water management goals create a strong link, in the form of enforceable permit conditions, between surface storage and other tools which would assure that a balanced implementation of all available tools will take place.

Before completion of the Record of Decision a Memorandum of ^{Agreement} between the Corps of Engineers, USEPA, and appropriate CALFED agencies would need to be completed. The MOU would establish the 404 compliance strategy and contain a programmatic 404 assurance finding on the need for storage or conveyance facilities in the Program. This MOU would provide a critically important assurance for stakeholders that Program implementation will proceed in a balanced manner. It would build on and incorporate the following work in progress:

- Completion of the Rough Screening Process for potential surface storage sites, which would lead to a short list of sites which would undergo detailed evaluation during Program implementation.
- Development of performance criteria for alternatives to surface storage, which would represent the limit of practicability for the purposes of the Section 404 Alternatives Analysis. These performance criteria are currently being developed as the result of several concurrent processes involving agency staffs and stakeholders for water use efficiency and water transfer actions.
- Development of a framework for the project level permits process which will be needed in the Program implementation phase. This would clarify to the extent feasible the

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scope of project level analysis necessary to supplement the programmatic analysis completed in Phase II, and the procedures needed to comply with the Section 404 permit process on a wide range of potential implementation actions.

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Developing a 404 process in this broader context is essential to maintaining program integration and stakeholder consensus. Hopefully we can take advantage of this opportunity to look creatively at 404 as a management tool as well as a regulatory process

CC: George Dunn, Chief of Staff
Governor's Office
Walter Pettit, Exec Dir
SWRCB

bcc: SteinBauer